

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MICHAEL T. JONES and U.S. POSTAL SERVICE,  
POST OFFICE, Pittsburgh, PA

*Docket No. 98-2121; Submitted on the Record;  
Issued August 25, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

On May 28, 1988 appellant, then a 40-year-old letter carrier, sustained injuries to his head, neck, back and right elbow while in the performance of duty. He ceased work following his injury and returned to limited duty on June 10, 1988. The Office accepted appellant's claim for contusion to the head, cervical and lumbar sprain and abrasion and contusion of the right elbow. Additionally, appellant received appropriate wage-loss compensation. For several years following his injury, appellant continued to work in a limited-duty capacity while receiving physical therapy on a regular basis.

In a decision dated December 29, 1995, the Office terminated appellant's compensation and medical benefits on the basis that the evidence established that appellant no longer had any continuing condition or disability causally related to his accepted employment injury of May 28, 1988. The Office's December 29, 1995 decision was subsequently affirmed by an Office hearing representative on February 7, 1997.

On January 22, 1998 appellant filed a request for reconsideration along with additional medical evidence. By decision dated March 23, 1998, the Office denied appellant's request for reconsideration. Appellant subsequently filed an appeal with the Board on June 22, 1998.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>1</sup> As appellant filed his appeal with the Board on June 22, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated February 7, 1997. Consequently, the only decision

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<sup>1</sup> *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 CFR §§ 501.2(c), 501.3(d)(2).

properly before the Board is the Office's March 23, 1998 decision, denying appellant's request for reconsideration.

The Board finds that the Office properly exercised its discretion in refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>2</sup> Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reviewing the merits of the claim.<sup>3</sup>

Appellant's January 22, 1998 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a point of law. Additionally, appellant did not advance a point of law or a fact not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.138(b)(1). With respect to the third requirement, submitting relevant and pertinent evidence not previously considered, while appellant submitted additional medical evidence, this evidence was not relevant to the dispositive issue on reconsideration. The evidence submitted on reconsideration pertained to appellant's recent treatment for depression and adjustment disorder with anxiety, a condition, which has not been accepted by the Office as related to appellant's May 28, 1988 employment injury. Inasmuch as the medical evidence submitted on reconsideration did not specifically address the relevant issue of whether appellant had any continuing condition or disability causally related to his accepted employment injury, the Office properly concluded that the newly submitted evidence was immaterial and thus, did not warrant reopening the claim for a merit review.<sup>4</sup> Consequently, appellant is not entitled to a review of the merits of his claim based on the third requirement under section 10.138(b)(1).<sup>5</sup>

As appellant is not entitled to a review of the merits of his claim pursuant to any of the three requirements under section 10.138(b)(1), the Board finds that the Office did not abuse its discretion in denying appellant's January 22, 1998 request for reconsideration.

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<sup>2</sup> 20 C.F.R. § 10.138(b)(1).

<sup>3</sup> 20 C.F.R. § 10.138(b)(2).

<sup>4</sup> Evidence that does not address the particular issue involved does not constitute a basis for reopening the claim. *Richard L. Ballard*, 44 ECAB 146, 150 (1992).

<sup>5</sup> On appeal appellant submitted additional medical evidence that had not previously been submitted to the Office prior to the issuance of its March 23, 1998 decision denying reconsideration. Inasmuch as the Board's review is limited to the evidence of record, which was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

The March 23, 1998 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.  
August 25, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

A. Peter Kanjorski  
Alternate Member